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No. 93-1180

In The

Supreme Court of the United States

October Term, 1993

AUTO CLUB INSURANCE ASSOCIATION,
Petitioner,

v.

PENTWATER WIRE PRODUCTS, INC.,
and
FREDERICK & HERRUD, INC.,
Respondents.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR CERTIORARI

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In its Brief in Opposition to Petitioner's Petition for Writ of Certiorari, Respondent Frederick & Herrud raises three basic arguments. Petitioner will respond to them under headings stating its position.

I.

AN INSURER WHO PAYS A DISPUTED CLAIM AND THEREBY BECOMES AN EQUITABLE SUBROGEE OF A PARTICIPANT OR BENEFICIARY OR AN ERISA HEALTH PLAN HAS STANDING TO PURSUE ITS SUBROGOR'S STATUTORY REMEDY AGAINST THE ERISA PLAN. (Frederick & Herrud Issues I.-II.)

At the outset, Petitioner points out that contrary to Respondent Frederick & Herrud's assertion, equitable

subrogation is *not* an equitable *remedy*, but a standing doctrine. A "remedy" denotes what type of relief may be obtained. *See, e.g., Mertens* v. *Hewitt Associates, Inc.*, 508 U.S. ___; 113 S. Ct. 2063 (1993). "Standing" defines who may pursue a remedy: in the instant case, those persons who may bring a civil action under the ERISA. *E.g., Hermann Hospital* v. *Meba Medical & Benefits Plan*, 845 F.2d 1286, 1288 (5th Cir. 1988). Consequently, cases such as *Mertens*, which define the nature of the relief available under the ERISA, are not relevant to this analysis.

As Frederick & Herrud concedes, federal courts do recognize that persons not enumerated in the ERISA may, in certain circumstances, have standing to bring an action against an ERISA health plan. *Hermann Hospital, supra*; *Misic* v. *Building Service Employees Health & Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986). The basis for that rule is twofold.

First, the ERISA does not prohibit the assignment of rights under an ERISA health plan. Second, affording standing to persons who assume the obligation of providing health care to a beneficiary or participant furthers the Act's purpose of protecting beneficiaries from the possibility of not receiving needed medical care as well as from the expenses incidental to litigation against a plan. *Hermann Hospital, supra* at 1290; *Misic, supra* at 1377. Doing so also comports with "the principle of subrogation generally applied in the law." *Hermann Hospital, supra* at 1290.

Contrary to Respondent's assertion, such standing is *not* limited to assignees of participants (who, arguably, could be considered beneficiaries). Both *Misic* and *Hermann Hospital* involved assignees from *beneficiaries*.

Nor, as Respondent suggests, is such standing limited to assignees. Although the Third Circuit has held that

subrogors do not have standing, *Allstate Insurance Co.* v. *The Sixty-Five Security Plan*, 879 F.2d 90 (3rd Cir. 1989), that Circuit — unlike the Fifth (*Hermann Hospital, supra*), Seventh (*Kennedy* v. *Connecticut General Life Insurance Co.*, 924 F.2d 698 [7th Cir. 1991]), and Ninth (*Misic, supra*) — does not recognize even assignees as having standing.

As Respondent points out, no federal circuit has squarely held that a subrogor such as Petitioner has standing to pursue a § 502(a)(1)(B) claim. However, there is direct federal district court authority for such standing, *Allstate Insurance Co.* v. *Operating Engineers Local 324 Health Care Plan*, 742 F. Supp. 952 (E.D. Mich. 1990), and the Sixth Circuit has implicitly recognized it, *Lincoln Mutual Casualty Co.* v. *Lectron Products, Inc., Employee Health Benefit Plan*, 970 F.2d 206 (6th Cir. 1992); *A.C.I.A.* v. *Health & Welfare Plans, Inc.*, 961 F.2d 588 (6th Cir. 1992); *Liberty Mutual Insurance Group* v. *Iron Workers Health Fund of Eastern Michigan*, 879 F.2d 1384 (6th Cir. 1989), as has the Seventh Circuit, *Winstead* v. *Indiana Insurance Co.*, 855 F.2d 430 (7th Cir. 1988), *cert. den.* 488 U.S. 1030 (1989).

The reasoning and rationale of the assignment cases, which Respondent does *not* challenge, are equally applicable to equitable subrogation cases. There is no question but that there is ample federal authority to support Petitioner's standing in the instant case. Moreover, if this Court sees a need to review the rules governing derivative standing under the ERISA, the instant case provides an ideal vehicle for doing so. In that regard, Respondent's argument on this issue hardly provides a basis for *denying* the Petition for Certiorari.

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II.

THERE IS NO UNIFORM FEDERAL COMMON LAW RULE OF DECISION GOVERNING CONFLICTING COB CLAUSES IN ERISA CASES. (Frederick & Herrud Issue III.)

Obviously, the decision of the Michigan Supreme Court directly conflicts with the Seventh Circuit's decision in *Winstead, supra*. Respondent correctly points out that in the context of disputes between ERISA plans, the courts are likewise in disarray. However, Respondent is silent as to how the absence of a uniform federal common law rule serves the purposes of the ERISA. It plainly does not. This Court should take the opportunity to promulgate one.

III.

THE RULE OF DECISION ADVOCATED BY PETITIONER WOULD PROVIDE CERTAINTY AND NATIONAL UNIFORMITY IN ERISA CASES INVOLVING CONFLICTING COB CLAUSES. (Frederick & Herrud Issue IV.)

Strictly speaking, the proper context in which to argue the merits of the rules of decision advocated by the respective parties is in the briefs on the merits. However, because Respondent Frederick & Herrud has made a separate issue of it, a brief response is in order.

The self-evident federal policy to be served by the rule of decision proposed by Petitioner is certainty and national uniformity, both of which further the Congressional intent to minimize the administrative costs of ERISA plans. A rule which would eliminate an entire category of litigation (and litigation-related expenses) would certainly serve that purpose.

The federal policy argument advanced by Respondent Frederick & Herrud is that the rule of decision advo-

cated by Petitioner would increase the cost of ERISA plans, and, therefore, tend to discourage employers from providing benefit plans for their employees. That argument falls one analytical step short of communicating the actual impact the rule promulgated by the Michigan Supreme Court.

Specifically, Respondent neglects to point out that the ultimate cost of *either* rule of decision will be borne by the employees. If a full setoff were available to Petitioner, costs would indeed be shifted to employees through an increase in the costs of ERISA plans. However, if *no* setoff is allowed, the cost will be shifted to the employees in the form of higher automobile insurance premiums.

That is so because coordinated no-fault coverage is (obviously) not available to persons who have nothing with which to coordinate their no-fault insurance. Consequently, employees whose sole health coverage is an ERISA plan would be ineligible for coordinated no-fault coverage. As a result, their no-fault premiums could increase as much as 40%.[1]

The pro rata rule of decision advocated by Petitioner represents a middle ground between the two extremes of cost-shifting, and thereby minimizes to the full degree possible the dislocation to both the no-fault system and the ERISA health plan system. And it does

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1 This Court can confirm that figure by reference to two documents which Petitioner has lodged with the Clerk of this Court. The documents were submitted with briefs filed in the Michigan Supreme Court in *Tousignant* v. *Allstate Insurance Co.* (Michigan Supreme Court No. 93773) and *Owens* v. *A.C.I.A.* (Michigan Supreme Court No. 94544), and are in the records of that Court. This Court therefore may take judicial notice of them. *E.g.*, *United States* v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986); *Granader* v. *Public Bank*, 417 F.2d 75 (6th Cir. 1969), *cert. den.* 397 U.S. 1065 (1970).

so while furthering the larger federal policy of rationalizing the ERISA system by providing an easily applied and nationally uniform rule of decision governing conflicting COB clauses.

Respectfully submitted,

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